No. 90-634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

RESPONDENTS HAVE NOT JUSTIFIED DISMISSAL OF THE COURT'S GRANT OF CERTIORARI.

Cowles Media counsel Mr. Borger told the Minnesota Supreme Court, "The central error which permeates this entire case is that the court below perceived no constitutional dimension to the case." J.A. 15. In all courts below, re-

spondents have argued that "any state-imposed sanction in this case violates their constitutional rights of a free press and free speech." A-11-12. In a statement issued after the decision below, Star Tribune executive editor Joel R. Kramer said, "We are especially pleased that the court has ruled that the decision to publish true facts relating to the activities of a 'political source in a political campaign' is one that is protected by the First Amendment." New York Times, July 21, 1990, at 6, col. 4, cited by respondent Northwest Publications, brief at 37.

Now, however, both respondents repeat claims made in their briefs opposing the petition for certiorari that the opinion below was based on state law and not the Constitution. Despite their claims, they have not given the Court reason to hold that its grant of certiorari was improvident.

This Court has jurisdiction in this case because the Minnesota Supreme Court held that its decision was required by the First Amendment and not merely by state law. After first holding that a conventional contract did not exist, the court below then pointed out that respondents' promises could constitute a legally enforceable implied contract under the doctrine of promissory estoppel. Under Minnesota law, promissory estoppel is a principle of contract law and is based on the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981); A-11 n.5. A later Minnesota Supreme Court decision held that *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983), cited below at A-10, "augmented the contract approach to include the closely related doctrine of promissory estoppel." *AFSCME Councils 6, 14, 65 and 96 v. Sundquist*, 338 N.W.2d 560, 566

(Minn. 1983). *Christensen* held for its plaintiff on the grounds of promissory estoppel even though he based his pleadings and arguments on violation of his contract without specific reference to promissory estoppel. 331 N.W.2d at 743, 745.

Christensen also emphasized that "promises rendered binding through estoppel are entitled to the normal enforcement remedies of general contract law." 331 N.W.2d at 750. Mr. Cohen's award of compensatory damages upheld by the Minnesota Court of Appeals also would be appropriate for the violation of a contract implied through promissory estoppel.

Despite Mr. Cohen's injuries from reliance upon respondents' promises, the court below regarded itself as bound by the First Amendment in determining that respondents would not be liable in an implied contract with Mr. Cohen. Its constitutional analysis began by observing that

> we have not up to now had to consider First Amendment implications. But now we must. Under a promissory estoppel analysis there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity. A-12-13.

The Minnesota Supreme Court then held, "Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our demo-

cratic society, namely, a political source involved in a political campaign." A-13.

Finally, the opinion below specifically held that Mr. Cohen could not recover in this case because of the First Amendment. "We conclude that in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights." A-13-14.

In the course of its reasoning, the opinion below cited seven decisions of this Court and one Court of Appeals case interpreting the First Amendment. A-12, n.6 and 7, A-13-14.

Still, as in its brief in opposition to the petition for certiorari, respondent Northwest Publications, at 24, claims that the Minnesota Supreme Court's holdings on promissory estoppel and the First Amendment are dicta because the promissory estoppel issue was not previously argued. Regardless, it is irrelevant whether or not a party argued an issue below when the state court actually considered and decided it. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. *Raley v. Ohio*, 360 U.S. 423, 436 (1959). None of these cases even suggested that this longstanding practice "carries constitutional overtones," as claimed by respondent Cowles Media Co., brief at 13-14.

Having granted certiorari, the Court has no reason now to regard its order as improvident or to remand the case for clarification. Unlike *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984), which involved a state court order unaccompanied by reasons, the grounds for the Minnesota Supreme Court's decision were explicitly stated in its opinion. Respondents have not shown that the full record of this case requires a reversal of the certiorari granted on the basis of the opinion below. On the contrary, the record demonstrates the newspapers' emphasis of First Amendment issues from their initial answers through their oral arguments before the Minnesota Supreme Court.

The decision of the Minnesota Court of Appeals held that the First Amendment did not protect respondents' violations of their promises to Mr. Cohen because of the absence of state action and because respondents waived any First Amendment claims. A-28-31, A-35-37. In concluding that enforcement of respondents' promises would violate their First Amendment rights, the opinion below did not even address the issues of state action and waiver. Its failure to consider such important First Amendment issues, far from warranting a reversal of the grant of certiorari as claimed by respondent Northwest Publications (brief at 23), only confirms that the opinion below erred in its constitutional analysis.

II.

RESPONDENTS' AND AMICI'S BRIEFS CONTAIN SEVERAL MISSTATEMENTS OF FACT.

Respondents' and amici's briefs have important factual errors. First, amici claimed repeatedly (brief at 7, 18, 19) that Mr. Cohen was "attempting to use the media to disseminate misleading information" to "smear" a candidate. Respondent Northwest Publications, brief at 32, accused him of engaging in a "dirty trick."

However, all that Mr. Cohen provided respondents, after receiving their promises of confidentiality, were authentic

copies of public court records. A-3. Neither the St. Paul Pioneer Press reporter nor its editors made any such accusations against Mr. Cohen at the time of their transaction with him. Instead, as discussed in petitioner's brief at 6, the newspaper's editors in an editorial said that the documents were relevant and provided the public with information it deserved to know. The editorial took the position that the source was irrelevant and said that the candidate and her campaign should have "informed the public themselves earlier and confronted the issue squarely." Pl.Ex. 29, R. 218-19.

Their brief notwithstanding, the only Northwest Publications employee at the trial to use the phrase "dirty trick" was its past executive editor and current vice president, John Finnegan, who used it not to criticize Mr. Cohen but to condemn the violation of a journalistic promise of confidentiality. Pl.Ex. 76, R. 1590-91, petitioner's brief at 9.

Northwest Publications' assertion, brief at 32, that it "had independent confirmation of petitioner's role" before it published his name has no support whatsoever in the record. Neither executive editor David Hall nor reporter Bill Salisbury nor any other editor or reporter of the Pioneer Press made any such claim in their testimony.[1]

[1]Far from confirming that petitioner was the source of the documents, as claimed by the Northwest Publications brief at 9, the Whitney campaign director actually told the Pioneer Press that he knew nothing of Mr. Cohen's involvement. R. 1437. After being informed of their reporter's promise of confidentiality to Mr. Cohen, Star Tribune editors, independently of the Pioneer Press, assigned a reporter, David Anderson, to "follow up on the story" and to contact members of the gubernatorial campaigns. A-23-24. (Mr. Anderson, was the author of the book on investigative reporting discussed in petitioner's brief at 30). Cowles Media, brief at 5, claimed that Mr. Anderson contacted campaign worker Gary Flakne who allegedly said that he had obtained the court documents for Mr. Cohen. Mr. Flakne, however, testified that Mr. Cohen did not ask him to pick up these records, and he denied telling this to Mr. Anderson or even talking with him. R. 1595-97. Mr. Cohen testified that he did not even know of the existence of the documents when Mr. Flakne signed out the records. R. 147. Mr. Anderson's account of the alleged conversation with Mr. Flakne was never published and Lori Sturdevant, who wrote the Star Tribune article identifying Mr. Cohen, did not agree that others had identified Mr. Cohen. R. 1616-17, 1647. The jury should be deemed to have resolved this factual dispute in Mr. Cohen's favor. Although the Minnesota Supreme Court mentioned the alleged Flakne comment to the Star Tribune (A-4), the opinion below made no reference to it in its discussions of the legal issues of fraud, contract, or implied contract and the First Amendment.

As pointed out in petitioner's brief at 4, Pioneer Press executive editor David Hall quickly decided to disclose Mr. Cohen's identity after learning of his reporter's promise. His testimony does not support the Northwest Publications claim, brief at 37, that his decision was "difficult and even agonizing," as demonstrated by the following response to a question from his own attorney.

> Q. Mr. Hall, would you please tell us why it is you chose not to identify Mr. Cohen in some other way without using his name?
> A. Honestly, I don't think that we ever considered doing it another way other than using his name. If we did, if we did talk about that, I don't recollect it. R. 1440.

The Minnesota Court of Appeals also found that Northwest Publication editors "did not engage in involved deliberations before deciding to disclose Cohen's identity." A-25.

Respondent Cowles Media Co., brief at 34-35, erroneously claims that the jury awarded Mr. Cohen damages for "injury to reputation, humiliation and embarrassment." In fact, the jury awarded nothing for such injuries. The trial court specifically instructed the jury that damages for emotional distress were not recoverable in this case. R. 1859. Mr. Cohen was fired from his job the day the newspaper articles identifying him — and in the Star Tribune's case his employer as well — were published, a fact respondents did not dispute in the Minnesota appellate courts. A-6, A-26.

The Minnesota Court of Appeals held that the loss of Mr. Cohen's employment was a reasonably foreseeable consequence of the dishonoring of respondents' promises to him. A-43. The jury in its special verdict awarded compensatory damages in an amount of $200,000 to "fairly and adequately compensate the plaintiff Dan Cohen for his loss." A-75. An expert witness testified that Mr. Cohen's financial losses resulting from respondents' wrongful conduct exceeded $725,000. R. 1115.

III.

THERE IS NO STATE ACTION IN HOLDING RESPONDENTS LIABLE FOR DAMAGES CAUSED BY VIOLATING VOLUNTARY PROMISES.

Respondents do not dispute that there was no governmental coercion or any other state involvement in their voluntary promises to Mr. Cohen in exchange for desired information. They claim, however, that holding them liable for damages caused by the violation of their voluntary agreements constitutes state action invoking their putative rights under the First Amendment. Previous decisions of this Court do not support the assertion that a party may thus seek refuge from the violations of its own voluntary promises. Contrary to the present case, the cases cited by respondents involved attempts by *third persons* either to seek judicial enforcement of restrictive covenants or to enjoin the application of a labor agreement against the wishes of those who were the actual parties to the respective agreements at issue in those actions. See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).[2]

[2]Contrary to Northwest Publications' claim (brief at 43), petitioner raised the state action issue at the beginning of the First Amendment discussion in his petition for certiorari, at 12, and referred the Court to the specific pages in which the Minnesota Court of Appeals held that there was no state action (A-28-31).

IV.

RESPONDENTS WAIVED THE ASSERTION OF FIRST AMENDMENT CLAIMS.

Respondent Cowles Media, brief at 18, claimed that its journalists did not regard the promise of confidentiality as creating an obligation to Mr. Cohen. On the contrary, its reporter, Lori Sturdevant, believed that identifying Mr. Cohen violated the promise she had made to him. R. 1647. She objected so strongly to the decision to dishonor her promise that she refused to allow her name to be used on the Star Tribune article identifying Mr. Cohen. R. 452; J.A. 1. Moreover, Star Tribune editors also indicated that her promise to Mr. Cohen imposed obligations upon the newspaper. These editors instructed Ms. Sturdevant to ask Mr. Cohen to release the Star Tribune from what managing editor Frank Wright, who was ultimately responsible for the decision to identify the petitioner (Cowles brief at 6), testified was "this agreement." Ms. Sturdevant made this request to Mr. Cohen two or three times in repeated telephone calls, but each time he refused to release the Star Tribune from its agreement with him. A-24, R. 1490.

Respondent Northwest Publications, brief at 47, claimed that it did not waive the assertion of First Amendment claims on the grounds of an alleged internal policy of its newspaper requiring reporter promises of confidentiality to be approved by an editor. However, its reporter, Mr. Salisbury, testified that reporters rather than editors deal with the public to gather information and that, regardless of whatever written policies may exist, grants of confidentiality are made by reporters without involvement by editors. R.

417, 423-24. Ms. Sturdevant also testified that she had the authority to promise confidentiality to sources of information without first securing the approval of Star Tribune editors. R. 449, 451-52. Neither the jury nor any court below found that the reporters' promises to Mr. Cohen were unauthorized by their newspapers.

As pointed out by respondent Northwest Publications, brief at 5, and the Minnesota Court of Appeals, A-22, Mr. Cohen first contacted both newspaper reporters by telephone on October 27, 1982, before meeting with them separately later in the day. In the telephone conversations, Mr. Cohen told each reporter that he would give him or her material which may relate to the election if "we can reach an agreement as to the basis on which I would provide this information to you." In the time between the telephone call and the meetings in their offices, the reporters had ample opportunity to contact their editors regarding a prospective agreement with Mr. Cohen.

Respondent Northwest Publications, brief at 46-47, also claimed that a promise of confidentiality to a source does not waive an asserted right to publish his name because holding journalists to their promises allegedly would infringe the public's right to know. However, the Pioneer Press' own employees, Mr. Salisbury and former executive editor Mr. Finnegan, testified that exposing sources promised confidentiality would discourage other potential sources from providing information and would seriously impair the flow of news to the public. Moreover, both respondents argued to the Minnesota Legislature that the "public's right to know" required adoption of the Minnesota Free Flow of Information Act to protect journalists' promises of confidentiality. See petitioner's brief at 8-10, 27-29; A-18 n.1.[3]

V.

NEWSPAPER PROMISES TO SOURCES OF INFORMATION SHOULD BE SUBJECT TO LAWS OF GENERAL APPLICABILITY.

Amici, brief at 8-9, admit that the First Amendment does not grant newspapers immunity from general laws concerning their commercial agreements. Without addressing the First Amendment holdings of *Employment Div., Dept. of Human Resources v. Smith*, 110 S.Ct. 1595 (1990), petitioner's brief at 23-24, amici claim an exemption for agreements made to gather news.

Despite amici's claims, the First Amendment does not justify a distinction between general commercial agreements and agreements with sources of information. Newspapers do not have a special privilege of access to information. They have no First Amendment right to compel private persons to supply information. *Houchins v. KQED, Inc.*, 438 U.S. 1, 10-11 (1978). To obtain much of the news, the press must promise confidentiality to sources of information.

The competitive pursuit of information is integral to the business operations of newspapers. Journalism School Dean Arnold Ismach testified that media organizations "are in the business of acquiring information. That is their trade." R. 694. The trial court found that the relationship between journalist and source of information is a commercial one;

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[3]Respondent Cowles Media, brief at 18, claimed that the Minnesota Court of Appeals' holding and analysis of the issue of waiver, A-35-37, is not properly before the Court because it was first raised in a brief before that court. However, as discussed previously, it is irrelevant when a federal question was raised in a court below when the question was actually considered and decided. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979).

the Minnesota Court of Appeals held that newspapers should no more be exempt from the law for violating promises to sources than for violating commercial agreements for other goods and services. A-66, A-33.

VI.

THE FIRST AMENDMENT DOES NOT PROTECT RESPONDENTS FROM THE CONSEQUENCES OF VIOLATING PROMISES.

Respondents refuse to acknowledge any obligation, apart from their own discretion, to honor promises they voluntarily make to procure information. Indeed, respondent Northwest Publications, brief at 34, asserts that "the newspapers did nothing unlawful or improper in securing the information" from Mr. Cohen through dishonored promises. Contrary to respondents' claims, there are important state and First Amendment interests in enforcing voluntary promises.

A. The Minnesota Supreme Court and Legislature have recognized important state interests in enforcing voluntary promises.

The opinion below recognized an important state interest in enforcing voluntary promises which in some cases could even overcome what it regarded as First Amendment rights. It pointed out that the doctrine of promissory estoppel, to imply contracts where promises induce action by promisees, is "well-established in this state." A-10. At the beginning of its consideration of First Amendment issues, the opinion below again recognized a state and common law interest in enforcing voluntary promises against which must be balanced perceived "constitutional rights of a free press." A-13. After it concluded that enforcement of respondents'

promises in this case would violate their First Amendment rights, the Minnesota Supreme Court declared that in other instances the state's interest in enforcing promises to sources may outweigh First Amendment considerations. A-14.

In fact, the Minnesota Legislature, in adopting the Minnesota Free Flow of Information Act, Minn. Stat. § 595.022, has determined that there is a special state interest in protecting promises of confidentiality to sources to promote the free flow of information to the public. See petitioner's brief at 10, 29; A-35.[4]

Another recent Minnesota Supreme Court decision recognized a state concern for honesty in dealing with others. In rejecting a proposed interpretation of a statute dealing with the tobacco industry, that court held that "we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health." *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (1989).

B. There is no overriding First Amendment interest in allowing newspapers to injure others by dishonoring their voluntary promises.

As pointed out in petitioner's brief at 26-27, newspapers do not have an unlimited right to publish truthful information. Several other cases cited by respondents also limited First Amendment protection to the lawful acquisition of information. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978); *Cox Broadcasting Corp. v.*

[4]In the *Jamieson* case referred to by respondent Cowles Media Co., brief at 38, a Minnesota trial court held that the Minnesota Free Flow of Information Act did not protect sources who defame others. Joint Minnesota Supreme Court appendix at A-570. Mr. Cohen, in contrast, merely supplied authentic copies of public court records.

Cohn, 420 U.S. 469, 496, 497 n.27 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311 (1977); *Butterworth v. Smith*, 110 S.Ct. 1376, 1381 (1990).

The requirement that punishment for the publication of truthful information must further a state interest of the highest order only applies in cases where the information was lawfully obtained. *Butterworth v. Smith*, 110 S.Ct. 1376, 1381 (1990). *Butterworth* stressed that its holding was limited to a journalist's right to divulge information in his possession before testifying to a grand jury and did not deal with his right to publish information which he obtained as a result of his participation in the proceedings of the grand jury. *Id.*

According to respondent Cowles Media Co., brief at 30 n.7, information obtained through violating state laws against theft would be "not lawfully acquired." Information procured by violating contracts implied through a state's law of promissory estoppel similarly should be regarded as unlawfully acquired. As pointed out in petitioner's brief at 24-25, no constitutional protection exists for lies in the form of defamation or the deliberate violation of promises. Instead, the Court has placed a high value on protecting expectations based upon promises. See petitioner's brief at 19.

The testimony of Mr. Finnegan[5] and Mr. Salisbury refutes amici's claim, brief at 22, that there is no "evidence whatsoever which even remotely suggests" that sources will not continue to give information to the media if this Court grants journalists a right to unilaterally violate promises of

[5]Mr. Finnegan is a member of the board of directors of amicus American Society of Newspaper editors. WHO'S WHO IN AMERICA 1036 (46th ed. 1990-91).

confidentiality. See petitioner's brief at 8-9, 28-29. Moreover, amici's argument contradicts the position of many of these same organizations in cases where they sought to protect their confidential sources. For example, amicus New York Times Co. as an appellant in *Matter of Farber*, 394 A.2d 330, 333 (N.J. 1978), argued that, if confidential sources were to be exposed through a court order, "newsgathering and the dissemination of news would be seriously impaired, because much information would never be forthcoming to the news media unless the persons who were the sources of such information could be entirely certain that their identities would remain secret." Amici supporting the New York Times in *Farber* who are also parties to the amicus brief in this case include the Times Mirror Co., Associated Press, Gannett Co., American Society of Newspaper Editors, and the American Newspaper Publishers Association. 394 A.2d at 331-32.

Amici, brief at 20-21, speculate about possible future cases if respondents are held liable for the consequences of violating their promises. When a similar argument was made in respondents' motion for judgment notwithstanding the verdict, the trial court rejected the premise that the appropriate solution to the possibility of unfounded accusations is to bar the availability of redress to persons with meritorious claims who have been damaged by unlawful conduct. A-67.

In this and any future cases, media organizations making promises of confidentiality have several options consistent with their agreements. They can run the story without revealing the source like the Associated Press, they can decline

to run the story at all like WCCO-TV, or they can refer to the source by type (such as "Republican activist" here) without using his or her specific name. Both the Associated Press and WCCO-TV honored their promises to Mr. Cohen even though they knew that their competition also had the story. R. 394, 398, 402-403, 505-506. Respondents' excuses in their briefs for identifying Mr. Cohen despite their promises could be used to attempt to evade obligations to any other person promised confidentiality. See testimony of Dean Ismach, R. 773-75.

Even respondents' own expert witness, David Lawrence, Jr., conceded that respondents did not follow the "guiding principle" of integrity in this case. R. 1417.

Respondent Cowles Media Co., brief at 21-22, and amici, brief at 17, claim that there is no need to civilly enforce reporter-source agreements because the media purportedly honor the ethical obligations of promises. The Minnesota Court of Appeals disagreed.

> The specter of a large damage award is a much more effective incentive for a publisher to honor a promise of confidentiality than the fear of criticism from other members of the press. Indeed, any such fear of professional criticism in this case was apparently insufficient to convince appellants to abide by their promises. A-34-35.

The trial court also found this argument unpersuasive.

> The newspapers' assertion that "severe criticism from fellow professionals and skepticism, loss of credibility and trust from potential or existing sources" provides sufficient deterrent against journalistic excesses rings not only unrealistic but disingenuous. A-67.

As Minnesota Supreme Court Justice Lawrence Yetka said in his dissent, "The simple truth of the matter is that the appellants made a promise of confidentiality to Cohen in consideration for information they considered newsworthy. That promise was broken and, as a direct consequence, Cohen lost his job." The newspapers should be held responsible for the injuries they caused Mr. Cohen. A-14.

This Court should reverse the decision below because, said Justice Yetka, "the news media should be compelled to keep their promises like anyone else." A-15.

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed and the judgment of the Minnesota Court of Appeals should be affirmed together with interest in accordance with the law of Minnesota.

Respectfully submitted,

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